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No. 93-861

# In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN L. CHEEK, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

## QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury that it could consider the reasonableness of petitioner's claimed beliefs in deciding whether he actually held those beliefs in good faith.

2. Whether the district court properly excluded a pamphlet published by petitioner that included an annotated copy of the Constitution and several writings by petitioner.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-23, is reported at 3 F.3d 1057.

### JURISDICTION

The judgment of the court of appeals was entered on August 23, 1993. The petition for a writ of certiorari was filed on November 22, 1993 (a Monday). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on six counts of willfully failing to file income tax returns, in violation of 26 U.S.C. 7203, and three counts of willfully attempting to evade and defeat his income taxes, in violation of 26 U.S.C. 7201. This Court reversed the court of appeals' affirmance of those convictions, holding that the district court had erred in instructing the jury that a person's belief that he is not obligated to pay taxes must be objectively reasonable in order to negate willfulness. *Cheek* v. *United States*, 498 U.S. 192, 203 (1991). Following a retrial, the jury again convicted petitioner on all counts. He was sentenced to a year and a day in prison, to be followed by five years' probation, and he was ordered to pay a $62,000 fine. Pet. App. 3, 6. The court of appeals affirmed. *Id.* at 23.

1. Until 1979, petitioner, a pilot for American Airlines, had filed annual federal income tax returns. Thereafter, he ceased filing returns, with the exception of a frivolous return he filed in 1982. Petitioner also began claiming a steadily escalating number of withholding allowances on Form W-4. Before 1980, he claimed 25 withholding allowances; in 1980, he increased the number to 39. Although the IRS informed petitioner that claiming 39 withholding allowances was unacceptable, he later elevated the figure to 60. In December 1980, petitioner met with a tax attorney who worked for American Airlines. The attorney informed petitioner that he was not exempt from the withholding requirements of the Internal Revenue Code. Nevertheless, petitioner submitted W-4 forms in 1981, 1982, 1983, and 1984 claiming "exempt" status. Pet. App. 4.

When the IRS instructed American Airlines not to honor those W-4 forms, petitioner sued American Airlines. The district court dismissed petitioner's complaint as frivolous and ruled that the employer could properly withhold taxes from his wages. Pet. App. 4-5. In 1982, petitioner filed a petition in the United States Tax Court, in which he claimed, *inter alia*, that he was not a "taxpayer," that his salary was not wages, and that he was not subject to income taxes because he was a "sovereign individual." The tax court informed petitioner that his arguments were frivolous, that they were contrary to law, and that the Supreme Court and every other court that had addresssed the issue had rejected those arguments. Gov't C.A. Br. 5-6.

Petitioner also sued various IRS employees, claiming that his wages were not taxable income and seeking a refund of the taxes that had been withheld. The district court dismissed petitioner's suit as frivolous, noting that petitioner's identical claims in a previous action had all been rejected. The court also fined petitioner $10,000 for "his repeated abuse of the judicial system for the pursuit of frivolous cases." Gov't C.A. Br. 6-7; Pet. App. 2 n.1, 5.

In addition, petitioner attended the criminal trial of a fellow American Airlines pilot, Charles Dare Schaut, which resulted in convictions for tax offenses. Petitioner was present when the trial judge instructed the jury that Schaut's wages as an American Airlines pilot were income. Gov't C.A. Br. 7.

2. During petitioner's second trial, the district court instructed the jury that willfulness "means the voluntary and intentional violation of a known legal duty or the purposeful omission to do what the law requires; in other words, [petitioner] knew he was required by law to file an income tax return and failed to do so, that is, with the purpose either to disobey or disregard the Internal

Revenue Code or regulations." Tr. 1980. In describing the tax obligations imposed by the Internal Revenue Code, the court informed the jury that (Tr. 1980-1981):

> A person liable to tax under the Internal Revenue Code must include the information required by the Internal Revenue Forms and Regulations promulgated by the Secretary.
>
> The provision in Title 26, United States Code, Section 6020, that permits the Secretary of the Treasury to prepare a tax return for an individual who has not filed is irrelevant and does not negate in any way the obligation of individual taxpayers to file their returns.

The court also noted that part of petitioner's defense theory was that, "based on his legal research and study, [and] information and materials provided to him, he in good faith misinterpreted and misunderstood" his obligations under the Internal Revenue Code. Tr. 1988. After setting forth additional portions of petitioner's theory of defense in some detail (Tr. 1988-1989), the court instructed (Tr. 1989):

> A defendant does not act willfully if he believes in good [faith] that he is acting within the law or that his actions comply with the law. A good faith belief is one that is honestly and genuinely held. Therefore, if [petitioner] actually believed that what he was doing was in accord with the tax statutes, he cannot be said to have had the criminal intent to willfully evade or defeat taxes or to willfully fail to file tax returns. This is so even if [petitioner's] belief was not objectively reasonable as long as he held the belief in good faith. Nevertheless, you may consider whether [petitioner's] stated * * * belief about the tax

statutes was reasonable as a factor in deciding whether he held that belief in good faith.

3. The court of appeals affirmed. The court rejected petitioner's claim that the district court had erred in refusing to instruct the jury regarding his reliance-on-advice-of-counsel defense. Pet. App. 8. The court held that because there was no evidence that petitioner fully and accurately disclosed his tax status to any attorney or that he acted in accordance with any attorney's advice, the district court properly refused to instruct the jury on the defense that petitioner had relied on the advice of counsel. *Id.* at 10.

The court of appeals also held that the district court had properly instructed the jury on the element of willfulness, and that the court's instruction was consistent with this Court's decision in *Cheek* v. *United States*, *supra*. Pet. App. 13. The court rejected petitioner's contention that the jury should not have been permitted to consider the reasonableness of his beliefs in determining whether he held such beliefs in good faith, noting that in *Cheek*, 498 U.S. at 203-204, the Court had remarked that "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws." Pet. App. 13.

The court of appeals further held that, contrary to petitioner's claim, the district court did not instruct the jury that petitioner's views on the applicability of 26 U.S.C. 6020 were "irrelevant"; it merely instructed that petitioner's views about that provision "did not accu-

rately reflect the state of the law" with respect to petitioner's legal obligations to file a return. Pet. App. 14.[1]

**ARGUMENT**

1. Petitioner contends (Pet. 9-13) that he was convicted "pursuant to jury instructions that contravened this Court's explicit holding" in *Cheek* v. *United States*, *supra*. Pet. 9. In particular, petitioner takes issue with the trial court's instruction permitting the jury to consider whether his claimed belief about the tax laws was reasonable in deciding whether he held that belief in good faith. In fact, the challenged instruction is entirely consistent with *Cheek*'s definition of willfulness under the criminal tax statutes.

In *Cheek*, the Court reviewed the court of appeals' holding that a misunderstanding of one's obligations under the tax laws must be objectively reasonable in order to negate willfulness in a criminal tax prosecution. This Court rejected that formulation, holding that under the tax laws, willfulness connotes "the voluntary, intentional violation of a known legal duty." *Cheek* v. *United States*, 498 U.S. at 201; see also *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (per curiam). The Court thus held that whether or not a mistaken belief is objectively reasonable, a good faith belief that one has complied with the tax laws negates willfulness and consti-

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[1] Petitioner also challenged the fact that the sentence imposed after his second trial, although essentially the same as his prior sentence, also included a fine. Pet. App. 6. In rejecting petitioner's claim that the fine was imposed in violation of his due process rights, the court of appeals held that since petitioner was tried and sentenced by a different judge in his second trial, the presumption of vindictiveness set forth in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), was not applicable, and that petitioner failed to meet his burden of showing actual vindictiveness. Pet. App. 16.

tutes a defense to a tax offense charge. *Cheek* v. *United States*, 498 U.S. at 202-203.

In this case, the district court's "willfulness" instruction corresponded to the Court's formulation in *Cheek*.[2] Furthermore, although an additional instruction regarding good faith is not required,[3] the district court specifically informed the jury that a good faith belief that a person's actions complied with his obligations under the tax laws would negate a showing of willfulness, and "[t]his is so even if [petitioner's] belief was not objectively reasonable." Tr. 1989. The court then added that, "[n]evertheless, you may consider whether [petitioner's] stated * * * belief about the tax statutes was reasonable as a factor in deciding whether he held that belief in good faith." *Ibid.*

Contrary to petitioner's contention (Pet. 10), the final portion of that instruction does not conflict with this Court's holding in *Cheek*. In *Cheek*, the Court expressly recognized that, in determining a person's state of mind, the jury may consider whether the person's beliefs were reasonable:

> [T]he more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple dis-

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[2] The trial court instructed the jury that willfulness "means the voluntary and intentional violation of a known legal duty or the purposeful omission to do what the law requires; in other words, [petitioner] knew he was required by law to file an income tax return and failed to do so, that is, with the purpose either to disobey or disregard the Internal Revenue Code or regulations." Tr. 1980.

[3] When the jury is properly instructed with regard to willfulness, an additional instruction on good faith is unnecessary. See *Cheek*, 498 U.S. at 201, citing *Pomponio*, 429 U.S. at 13.

> agreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.

498 U.S. at 203-204. In view of the Court's statement, an instruction that informs the jury that it may consider whether a defendant's belief was reasonable in determining willfulness does not constitute legal error. Nothing in that instruction suggested that petitioner's beliefs must have been reasonable to constitute a defense, and other portions of the instructions made clear that there was no such requirement.

Petitioner is not helped by his reliance (Pet. 9-10) on *United States* v. *Powell*, 955 F.2d 1206, 1211 (9th Cir. 1991). In that case, the court of appeals held that the jury *may* consider the "reasonableness" of a defendant's alleged beliefs in determining whether he actually held them. *Id.* at 1212. Other court of appeals decisions are to the same effect. See *United States* v. *Barnett*, 945 F.2d 1296, 1299 (5th Cir. 1991) (upholding instruction allowing jury to consider the grounds on which a defendant based his claim of good faith in determining whether he actually acted in good faith), cert. denied, 112 S. Ct. 1487 (1992); *United States* v. *Collins*, 920 F.2d 619, 622-623 (10th Cir. 1990) (upholding instruction that "if you regard [the defendant's] belief as being highly unreasonable, you may consider this along with all other evidence on the question of whether his belief was indeed genuine or merely feigned"), cert. denied, 111 S. Ct. 2022 (1991); *United States* v. *Turano*, 802 F.2d 10, 11 (1st Cir. 1986) ("The jury * * * must use whatever evidence they can to determine what [defendant] believed. The more unreasonable the defendant's alleged belief that he did not have to file a tax return, the less likely he, in fact, held that belief. Stating this obvious point does not eliminate the

requirement that, in order to convict, the jury find that defendant knew he was legally required to file.").

Petitioner also takes issue (Pet. 10) with the following instruction (Tr. 1980-1981):

> The provision in Title 26, United States Code, Section 6020, that permits the Secretary of the Treasury to prepare a tax return for an individual who has not filed is irrelevant and does not negate in any way the obligation of individual taxpayers to file their returns.

He asserts (Pet. 10) that that instruction "ruled out, as a matter of law, jury determination of a crucial belief of [petitioner] about what the tax statutes required of him." Petitioner, however, takes the instruction out of context. The instruction was part of a series of instructions concerning the duty to file returns; it simply pointed out that Section 6020 was irrelevant to the existence of that duty. As the court of appeals determined (Pet. App. 14), it was not error for the district court to instruct the jury with respect to the requirements of law. The district court did not instruct the jury, or in any way suggest, that petitioner's *beliefs* about Section 6020 were irrelevant to his contention that he acted in good faith. See *United States* v. *Barnett*, 945 F.2d at 1300.[4]

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[4] Petitioner also asserts (Pet. 11-12) that the district court's imposition of a fine was designed to teach him a harsh lesson for seeking review in this Court, prevailing, and defending himself at his retrial. Because that question is neither presented by the petition nor fairly included in the questions presented, it is not before this Court for review. See *Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam). Nor would it raise an issue meriting review. As the court of appeals pointed out (Pet. App. 17-18), the district judge identified two aggravating facts arising since petitioner's original trial that justified a higher sentence. First, petitioner re-

2. Petitioner contends (Pet. 13-17) that the district court erred in excluding evidence concerning his study of the Constitution. His only specific complaint concerns the exclusion of a booklet he had independently published containing an annotated copy of the Constitution, an accompanying recitation of petitioner's view of court decisions, and "a brief essay by [petitioner]." Pet. 15. Petitioner argues that his booklet was an important component of his good-faith defense and should have been admitted. That claim, however, was not raised or decided in the court of appeals and is thus not properly before this Court. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, the district court properly excluded petitioner's pamphlet. The admission or exclusion of evidence is a matter within the discretion of the district court, see *Hamling* v. *United States*, 418 U.S. 87, 124-125 (1974), and the district court here properly exercised its discretion under Fed. R. Evid. 403. The district court found that petitioner's constitutional booklet was "clearly misleading" (Pet. 15), and there is no basis for overturning that finding. Evidence that petitioner had diligently read the Constitution would not have negated the evidence that petitioner was well acquainted with the Internal Revenue Code and the obligations it imposed on him. And, as this Court explicitly held in *Cheek*, a de-

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peatedly refused to comply with the judge's rulings during the trial. Second, petitioner demonstrated what the trial judge characterized as hypocrisy in saying he was willing to abide by decisions of this Court and then refusing to do so. The district court noted that petitioner had pursued a defense based on a claimed belief that the tax laws were unconstitutional even though this Court had held in petitioner's case that such a belief was not a defense.

fendant's belief that the requirements of the tax laws are unconstitutional does not negate willfulness in a tax prosecution. 498 U.S. at 205-206. Accordingly, petitioner's "views about the [constitutional] validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury." *Id.* at 206.

As petitioner notes (Pet. 8), the district court admitted a Government Printing Office copy of the Constitution as a jury exhibit. It is unclear how petitioner's study of the Constitution was relevant to his claim (Pet. 14) "that he was attempting in good faith to discover and understand" his obligations under the federal tax laws. But assuming the evidence relating to his study of the Constitution was relevant, the jury was given the constitutional text that petitioner studied; the only material that the court excluded was petitioner's commentary on it, which the court found to be misleading. The court was entitled to exclude evidence that was likely to mislead the jury. See, *e.g.*, *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2798 (1993); *United States* v. *Castell*, 584 F.2d 87, 89 (5th Cir. 1978), cert. denied, 440 U.S. 925 (1979).[5] Petitioner has thus failed to show why

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[5] In passing, petitioner states (Pet. 15-16) that "[a]nother example" of his good faith attempt to avoid intentionally violating any legal requirement was his request to an attorney, Robert Collins, for an opinion letter regarding his tax liability. Petitioner does not raise any issue regarding his purported reliance-on-advice-of-counsel defense as a question presented, see Pet. i, and it is not subsumed in the issue of whether the district court correctly excluded petitioner's constitutional materials. To the extent, however, that petitioner is renewing his claim that the trial court erred in refusing to give an instruction with respect to petitioner's reliance-on-advice-of-counsel defense, the court of appeals correctly held that petitioner had not established the factual predicate for such an in-

his own out-of-court statements were in any way relevant to his defense, even assuming those statements were admissible as non-hearsay, which is doubtful.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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struction to be given. Pet. App. 10. That fact-specific holding warrants no further review.